
IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHANNA NELSON,
Plaintiff in Error,

—vs—

W. W. CASEY, HENRY SHAT-
TUCK, and ALLEN SHATTUCK,
Defendants in Error.

No. 3698

ERROR TO THE DISTRICT COURT FOR THE
TERRITORY OF ALASKA,
FIRST DIVISION

Brief of Defendants in Error

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STATEMENT OF THE CASE

The defendants in error are preparing their brief without having before them a copy of the brief of plaintiff in error. It therefore becomes necessary for defendants in error to state in substance the facts disclosed by the record.

The following is a substantial recital of the material allegations of the amended complaint.

Plaintiff is and ever since the 4th day of October, 1915, has been the owner of Lots Nine (9) and Ten (10) in Block Two Hundred and thirteen (213) of the Casey-Shattuck Addition to the City of Juneau. That prior to September 26, 1918, said lots were the place of residence and abode of plaintiff and her family; that the plaintiff had on said lot prior to the date last mentioned two houses built for use as residences and the ground about which and upon said lots were beautified by gardens and improved by the planting of berry bushes and the erection and maintenance of other out houses and fences.

That Gold Creek is a mountain stream, both sides of which are formed by very steep mountains rising to an elevation of some 3000 feet above the creek bed, by reason of which fact heavy rains would and actually did cause in said creek periodically sudden freshets of great magnitude and violence; that that part of the City of Juneau known as Casey-Shattuck Addition consisting principally of a delta of low ground formed by said Gold Creek and sloping toward the southwest and over which

said Gold Creek flowed after it emerged from the narrow gorge immediately to the north of said Casey-Shattuck Addition; that during the year 1914 the defendants, for their own use and benefit, and for the purpose of reclaiming from the waters of Gold Creek certain tracts of land on the said delta and in the said Casey-Shattuck Addition, and for the purpose of making said land suitable and marketable for residence purposes, changed the course of said stream below said gorge and where it flows over said delta from a southwesterly to a southerly direction and to a position where it was by said change caused to flow adjacent to the lots of plaintiff, and that defendants for the said purpose confined the course of said stream to a channel too narrow and too shallow to accommodate and safely convey all the waters which might and did flow through said stream during the period of great precipitation of rain and great freshets. That for the purpose of changing and confining the channel of said stream defendants erected bulkheads in and across the old channel of said stream so as to divert the waters away from the old channel and force the waters of said stream to flow in a new channel and in a southerly direction adjacent to plaintiff's

lots; that defendants erected upon both sides of the new channel bulkheads or embankments; that such embankments on the easterly side of said new channel and at a point where the same runs adjacent to plaintiff's lots and for several hundred feet northerly therefrom, were unskillfully and negligently constructed and were too weak and inadequate to withstand the force of the water which might and would likely come down said channel during said freshets and during said period of heavy downpour of rain on the watershed of said stream as from time to time *naturally* and *generally* occurred and might naturally be expected to occur in the future. That at the time plaintiff became the owner of said lots and ever after she was ignorant of the change of the course of said stream and was ignorant of the fact that prior to the erection of said dam by defendants the general course of said Gold Creek was at other and different places and that during the freshets the said stream naturally spread over a large area and flowed through several channels; that plaintiff was also at all times ignorant of the weak and inadequate condition of the artificial embankments constructed by defendants adjacent to her said lots and northerly

therefrom; that defendants knew or should have known that Gold Creek was a violent stream having violent freshets from time to time; knew that the inevitable effect of the bulkheads erected by defendants across the old channel and on the westerly side of said stream was to obstruct the natural course and tendency of the waters of said stream, and that said bulkheads did divert and force the waters of said stream with great violence against plaintiff's property; that the new channel constructed by the defendant was too small to safely convey the waters of the stream during periodical freshets; that the bulkhead on the easterly side of the new channel adjacent to plaintiff's property and for several hundred feet northerly therefrom was too weak, flimsy and inadequate to withstand the force of the water which would *naturally* be thrown against it in case of freshets, after the bulkheads or the embankment in the old channel and on the westerly side of the new channel were erected by defendants. By reason of the defendants' acts above described plaintiff's property was at all times exposed to the danger of being swept away by said freshets in said stream. That prior to, at and after the turning of the channel and the erection of said

bulkheads, defendants surveyed and platted the lands and premises on both sides of the new channel and over the former delta into building lots, streets and avenues, dedicated the said streets and avenues to public use, and offered said lots for sale to the public, defendants being then and there the owners of said premises. That at the time of the erection of said bulkheads defendants sold a large number of lots to many individuals and for a long time thereafter and until the 26th day of September, 1918, continued to offer for sale to the public the remainder of said tract. That before the 26th day of September, 1918, a large number of lots had been sold by defendants; large sums of money had been expended by purchasers in the improvement of said lots; that the City of Juneau, a municipal corporation, had at great expense constructed streets and built sidewalks upon said premises and that said streets and sidewalks were maintained by the City of Juneau up to and on the 26th day of September, 1918, at great expense. That on the 26th day of September, 1918, while plaintiff was the owner of the property above described a downpour of rain occurred which caused a freshet in Gold Creek and by reason of the acts of defendants above stated,

the waters in Gold Creek were prevented from spreading freely in a southwesterly direction and were forced up against the artificial and inadequate bulkhead erected by defendants and adjacent to plaintiff's lots and northerly therefrom. That by reason of the weakness and inadequacy of said embankments and bulkheads they gave way under the force of the water and that the residence of plaintiff, together with considerable of her furniture, were washed away and destroyed and that she suffered damaged in the sum of \$9000.00. (Tr. 15 to 24 inclusive.)

To the amended complaint the defendants in error interposed a demurrer alleging that the complaint does not state facts sufficient to constitute a cause of action against the defendants, or either of them (Tr. 25). The Court sustained the demurrer (Tr. 26). The plaintiff elected to stand on her amended complaint and the Court thereupon entered judgment dismissing the action. (Tr. 27-28.)

We submit the judgment of the trial court should be affirmed for the following reasons:

1. The amended complaint alleges that the plaintiff, on the 4th day of October, 1915, acquired

the real estate which she alleges was damaged by the force of the waters of Gold Creek escaping after the breaking of the dam (Tr. 15) ; and that the dam and bulkheads were built and the waters of Gold Creek diverted by defendants into a new channel in 1914 (Tr. 17).

2. The amended complaint fails to allege that defendants, or any of them, were the owners of or in possession of the dam or bulkheads or the ground on which the same are situate on the 26th day of September, 1918, when it is alleged plaintiff's property was damaged by escaping waters occasioned by the alleged breaking of the dam and bulkheads. The reasonable and natural inference from the facts stated in the amended complaint is, that the dam and bulkheads were, at that time, in the possession of and under the control of the City of Juneau, a municipal corporation.

3. The amended complaint does not allege that defendants, or any of them, maintained the dam, bulkheads or new channel after the construction thereof, nor does it allege any facts warranting the inference that defendants were obligated to plaintiff, or any one else, to maintain the same.

Referring to the first reason assigned why the judgment of the trial court should be sustained, we contend that since the plaintiff purchased her property, alleged to have been destroyed, after the building of the dam and bulkheads and the diversion of Gold Creek, she purchased the same fully realizing the character of Gold Creek and the character of the dam and bulkheads which would be necessary to withstand its freshets during certain seasons of the year, for the amended complaint does not allege that the plaintiff was not equally as familiar with the history of that stream and its freshets as were the defendants. It is true the amended complaint alleges that the plaintiff, at the time she purchased the property, was ignorant of the changes that had been made in the channel by the defendants and was ignorant of the inadequate character of the dam and bulkheads to withstand the pressure of the waters of Gold Creek during certain periods of the year, but it would seem that it was her duty to ascertain whether or not the dam and bulkheads were sufficient to withstand the force of the waters of Gold Creek during the freshets before she purchased the property. A different rule would obtain if she alleged any facts

from which it could be reasonably inferred that the defendants were obligated to maintain the dam for a period of time extending beyond the date of the breaking of the dam. Plaintiff knew when she purchased the property that the dam and bulkheads were permanent structures, and she bought the property burdened with whatever danger and menace might be caused by the insecure character of the dam and bulkheads. In her amended complaint she says: "That by reason of these facts the plaintiff's property aforesaid was by defendants' said wrongful acts, exposed to the danger of being washed away by the water thrown or forced against said property by reason of the various embankments or bulkheads erected by defendants across and in the old channel of said stream to prevent said stream from spreading in the manner it did before said obstructions, embankments or bulkheads were erected as above described." (Tr. 18.)

"The evidence shows that the improvement on the dam is of a permanent nature, and was completed a year or more before appellant became the owner of the land to which the injury is alleged to have been caused by the overflow. Any damage that resulted to it, therefore, by reason of this increased height of the dam

was caused while the title thereto remained in her brother-in-law, and any cause of action on account thereof was in him, and his failure to assert such right as he may have had does not have the effect of transferring to his vendee, the appellant, the right to sue therefor. The injury had been sustained when she purchased. She took the land in its injured or damaged condition and it must be presumed that the damage to the farm by reason of the overflow was taken into consideration and accounted for to her in fixing the price which she was required to pay. *City of Richmond vs. Gentry*, 136 Ky. 319; 124 S. W. 337; 136 Am. St. Rep. 255; *Louisville & Nashville R. R. Co. vs. Lambert* 110 S. W. 305; 33 Ky. Law Rep. 199; *Stickley vs. Chesapeake & O. R. R. Co.* 93 Ky., 323; 20 S. W. 261; 14 Ky. Law Rep. 417''; *Pence vs. City of Danville*, 145 S. W. 385 at 386.

In *Beauchamp vs. Taylor*, 111 S. W. 609 at 611, the court said:

“Defendants demurred to the evidence, and here insist that the demurrer should have been given. Their contention is, that the plaintiff purchased the land with knowledge that defendants had constructed and were maintaining the levee, and therefore purchased it burdened with the levee. If the levee was not a lawful structure—that is, if it obstructed the flow of water in a natural channel—it was a nuisance, and while plaintiff cannot sue and recover for the erection of the nuisance, he is clearly entitled to recover any damage he may have sustained by reason of its maintenance.”

City of Richmond vs. Gentry, 124 S. W. 337, at 338-339.

In *Louisville and N. R. Co. vs. Lambert*, 110 S. W. 315, at 307 the court said: "But appellant vigorously contends that as appellee sold two of the lots before the wall was completed, he had no cause of action as to them against appellant; and that the purchaser alone, who owned the lots at the time of the completion of the wall, had the right to sue. It is well settled in this state that the party owning the lots at the time the damage was done has the right to sue. This right is not affected by his subsequent parting with the title. *Stickley vs. Chesapeake & O. Ry. Co.*, 93 Ky. 323; 20 S. W. 261. In this case, if the property in question was damaged by the construction of the wall, some one had the right of action. If the purchaser of the property had brought suit to recover, the conclusive answer would have been that the property had been permanently damaged in its market value,—if damaged at all,—at the time of the purchase. He bought the property at a reduced price. He was not damaged, because he got the advantage of the reduction in the price."

It may be insisted that the following cases, *Chesapeake & O. Ry. Co. vs. Robbins*, 157 S. W. 903, and *Sherout vs. Chesapeake & O. Ry. Co.*, 162 S. W. 97, both Kentucky cases, do not sustain the view herein contended for, but it will be observed in both of those cases that it was alleged and proved that the plaintiffs could not, by reasonable diligence, have ascertained that the structures complained of,

in any way depreciated the vendible value of the property or caused the overflowing of the same. In *Chesapeake & O. Ry. Co. vs. Robbins, supra*, the court in its opinion said:

“Appellee, by an amended petition, alleged, in substance, that, at the time of the construction of the bridges, abutments, piers and embankments by appellant, it was not apparent to her, or to any person of ordinary prudence residing in Salt Lick, that same would obstruct or divert the waters of the creeks and that this did not become apparent until the flood of 1909, nor could she before that time, by the exercise of the highest degree of care, have ascertained that the abutments, piers and embankments would obstruct or divert the waters of the creeks or cause them to overflow her premises.”

There is a similar allegation in the petition of *Sherout vs. Chesapeake & O. Ry. Co., supra*. A careful analysis of those two cases will disclose the fact that the courts proceeded on the theory that the pleadings and proofs showed that the plaintiffs when they purchased their property could not have anticipated the menace or danger to the same caused by the building of the piers and structures, which thereafter produced the overflow, occasioning the damages complained of.

Plaintiff in her amended complaint does not allege that she was not familiar with the danger to

her property occasioned by the building of the dam and bulkheads, nor does she allege that she was not equally as familiar as the defendants with the history of Gold Creek freshets and the necessary strength of dams and bulkheads to withstand the force of the waters of that stream during such freshets. She could easily have ascertained from any one accustomed to estimating the strength of dams, whether or not the dam and bulkheads constructed by defendants would withstand the force of the waters occasioned by any freshet in Gold Creek which could reasonably have been anticipated by the defendants.

“But the rule as to the class of cases is subject to an important modification where the injury complained of is permanent. In such cases the rule is altered for the sake of convenience, and but one action is allowed. The plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant’s act. Injuries caused by permanent structures infringing upon the plaintiff’s rights in his land, such as railroad embankments, culverts, and bridges, permanent dams and permanent pollutions of water, fall in this class. Gould on Waters, Third Addition, page 416.”

The structures complained of in the amended complaint are permanent structures. Plaintiff purchased her property subsequent to the erection of

such structures. Whatever damage to her property was occasioned by the building of such structures was done prior to the time of her purchase. She therefore could not acquire a right of action against the defendants for damages done to the property prior to her purchase, as it must be assumed that the price she paid for the property was reduced by the amount of damage occasioned by the dam and bulkheads.

40 Cyc., 85-86 and 87.

We submit that the second reason assigned why the judgment of the trial court should be affirmed follows almost as a corollary from the first contention of defendants in error. The amended complaint does not allege that the defendants, or any of them, were the owners of the dam on the 26th day of September, 1918, when it is alleged plaintiff's property was damaged by the waters of Gold Creek breaking the dam. It may be that the defendants parted with their ownership of the dam long prior to that time. Plaintiff in error may contend that if it be a fact that defendants had parted with the title to the dam and bulkheads prior to the date of the alleged damage, that such fact or facts would be a matter of defense. But in order to state a cause of action against the defendants it is necessary that facts constituting

negligence be alleged. The mere building of the dam and bulkheads is not such negligence as plaintiff can complain of because she purchased her property subsequent to the erection and construction of the dam and bulkheads. If it be true that she is barred from relying on the alleged negligence in the original construction and building of the dam and bulkheads by the defendants, then in order to state a cause of action against the defendants she must allege negligence in the subsequent maintenance of the dam and bulkheads. But before she is warranted in claiming that it was the duty of the defendants to maintain the dam and bulkheads she must allege that they were either the owners of the dam and bulkheads or else controlled or were in possession of the same at the date of the alleged freshets, which she alleges broke the dam and damaged her property. The plaintiff in her amended complaint not only fails to allege that the defendants owned, claimed or were in possession of the dam and bulkheads on the 26th day of September, 1918, but she does allege that long prior to that date defendants surveyed and platted the lands and premises on both sides of the new channel, and upon and over the delta into building lots, streets and avenues, and

dedicated the streets and avenues to public use, and at great expense the City of Juneau, a municipal corporation, constructed streets and built sidewalks, and that said streets were on that date maintained at great expense by the City of Juneau (Tr. 2). After defendants dedicated the streets and avenues of the Casey-Shattuck Addition to public use and the City of Juneau, a municipal corporation, accepted such dedication, and in accordance with the same improved the streets and controlled them, it is fair to infer that the dam and bulkheads which protected that addition to the City of Juneau from Gold Creek and its freshets, were also dedicated to public use and were under the control of the City of Juneau at and prior to the time of the alleged breaking of the dam and bulkheads. We submit that such is a fair assumption in the absence of any allegation to the contrary in the amended complaint.

“The one who owns the dam at the time it gives way is the one who is *prima facie* liable for the injury done by it. The one who constructed it is not, necessarily, liable for the injury. He may relieve himself from liability by selling the structure and placing another in possession.” Third Farnham on Waters and Water Rights, s. 875-A, p. 2549.

Passing now to the third reason assigned by the defendants why the judgment of the trial court should be affirmed. The amended complaint does not allege that defendants, or any of them, maintained the dam and bulkheads or the new channel after the construction thereof, nor does it allege any facts warranting the inference that defendants were obligated to plaintiff, or any one else, to maintain the dam and bulkheads or the new channel. It is true the amended complaint does allege that it was the duty of the defendants at all times to keep and maintain the bulkheads and embankments in good condition and repair (Tr. 22), but that is merely a conclusion. No facts are alleged indicating any such legal duty or obligation. The purposes for the building of the dam and bulkheads and diversion of Gold Creek by the defendants are stated in paragraphs III and VII of the amended complaint (Tr. 17 and 20-21-22). It is obvious, therefore, that defendants would have no material interest in the dam and bulkheads after they had sold all of the lots in the Casey-Shattuck Addition. No person purchasing a lot in that addition subsequent to the erection of the dam and embankments could reasonably have expected that the defendants would continue to main-

tain the dam, bulkheads and new channel interminably. If defendants are liable to persons purchasing subsequent to the building and erection of the dam and bulkheads on account of escaping waters resulting from the breaking of the dam, then when would such liability cease? When would the statute of limitations begin to run? If the defendants had obligated themselves by contract to maintain the dam for a period of years they would be liable for any breach of such contract, but the amended complaint does not allege any such contractual relation between the plaintiff and the defendants. There is no allegation in the complaint that defendants obligated themselves to maintain the dam for any period of time. If the alleged breaking of the dam occurred twenty years after the construction of the same and the change in channel by the defendants, would the defendants still be liable for any damage sustained by the plaintiff? We submit that such a contention is obviously untenable in the absence of a showing that the defendants in some way specifically obligated themselves by contract to protect plaintiff's property from escaping waters occasioned by the breaking of the dam. If the contention of plaintiff is sound, then defendants in error would be lia-

ble to the plaintiff in error or to her successors in title for any damage that might occur at any time in the future by reason of the breaking of the dam and the consequent damage to the property of plaintiff and her successors in interest.

If “A” should construct a dam on his own premises for the purpose of appropriating a stream for irrigation or other purposes and subsequently should sell the land to “B” and a freshet should occur after the sale which should destroy the dam and a part of the real estate so sold by “A” to “B,” is “A” liable to “B” for damages sustained on account of such destruction? If so, for what period of time would such liability continue? Assume that the dam breaks by the force of the water ten years after the sale, is “A” still liable to “B” because the dam was inadequate to withstand the waters of the freshet? It is true there is no direct allegation in the amended complaint to the effect that plaintiff purchased her lots from the defendants, but the amended complaint alleges that her lots are situate in the Casey-Shattuck Addition and that defendants were the owners of the Casey-Shattuck Addition. It seems apparent that before the defendants in this case could be held liable to the plaintiff it would be

necessary for her to allege that the defendants still owned the bulkheads and new channel and that the same were being maintained by them for their own purposes at the time of the alleged breaking of the dam, or that the defendants had obligated themselves by contract to protect the property of plaintiff against the breaking of the dam and bulkheads for a period beyond the time when the alleged damage is claimed to have occurred.

As before stated, not having a copy of the brief of plaintiff in error before us, we are unable to anticipate on what authorities she will rely in this hearing, but we wish to discuss some of the cases which were cited by plaintiff in error before the trial court. That court in its opinion (Tr. 11-12-13-14) clearly differentiates between the facts in three of the cases cited by plaintiff in error, and the facts in the case at bar. We deem it unnecessary to devote further consideration to those cases.

In the argument before the trial court plaintiff in error also relied on *Wilson vs. Boise City*, 55 Pac. 887. The ruling in that case might be successfully invoked by plaintiff in error if the City of Juneau were the defendant in this action. As the court

said in its opinion in that case, "It was the duty of the defendant to protect all the property along the line of said artificial channel, not only for the benefit of persons who owned such property at the time of the construction of such artificial channel, but also for the benefit of their successors in interest." That is, there was a continued obligation on the part of the city to protect the lives and property of its inhabitants against the breaking of the artificial canal constructed and maintained by the city. But the reason for the ruling of the court in that case does not exist in the case at bar. The City of Boise, in that case, not only constructed the artificial channel which was inadequate to convey the waters of the stream during freshets, but continued to maintain such artificial channel in its inadequate condition, and the liability of the city resulted from its failure to maintain a channel which would safely convey the waters of the stream during all seasons of the year and thereby safeguard the property of the inhabitants of the city.

It will be observed that in the statement of facts in *Wilson vs. Boise City*, 55 Pac. 887, *supra*, the following appears in the stipulation:

“That ever since the construction of said flume the same has been used for the purpose of carrying the waters of said Cottonwood Creek where the same leaves said mountains to Boise River, and that the same has been cared for and maintained by the Mayor and Common Council.”

There are no facts alleged in the amended complaint from which it can be inferred that the defendants were obligated to maintain and keep in repair the dam, bulkheads and new channel.

Plaintiff in error also relied before the trial court on *Wilson vs. Boise City*, 117 Pac. 115, which was a later case decided on by the Supreme Court of the State of Idaho, involving the inadequacy of the flume which had been held to be inadequate to convey the waters of Cottonwood Creek, in *re Wilson vs. Boise City*, 55 Pac. 887, *supra*. The court in the last *Wilson* case held the City of Boise was liable to the plaintiff because it had undertaken to and did divert the waters of Cottonwood Creek from their natural channel and undertook to, and did attempt to maintain a new channel for such waters. The court held that the City of Boise having once diverted the waters of the creek from their natural channel, obligated itself to protect the inhabitants

of the city against damages sustained on account of the inadequacy of such new channel to convey the waters of the creek during a freshet.

Plaintiff in error also cited at the trial *Sherout vs. Chesapeake & O. Ry. Co.*, 162 S. W. 97. In that case the defendant claimed it was not liable to the plaintiff because the latter had purchased his land after defendant had erected its concrete abutments and piers to support its railroad bridges. In passing upon the controversy the court said, among other things: "This view of the matter ignores the fact that the obstruction of the two streams by the abutments, piers and bridge approaches, continued after appellant's acquisition of title to the property." That is, the railway company continued to use and maintain its piers and bridge approaches, and the maintenance of the same produced the damages complained of by the plaintiff. In the case at bar there are no facts alleged to justify the deduction that defendants in error were at the time of the alleged breaking of the dam maintaining or using, or attempting to maintain or use, the same. In fact, the reasonable inference from all of the allegations in the amended complaint is that the City of Juneau

was maintaining or at least should have been maintaining the dam, bulkheads and new channel prior to and at the time of the alleged breaking of the dam and bulkheads, because long prior to that time the Casey-Shattuck Addition had become a part of the City of Juneau. Its avenues and streets had been theretofore dedicated to the city by the defendants in error, and the City of Juneau had assumed jurisdiction and control of the same. Manifestly the rulings in all of the cases cited by plaintiff in error at the trial are inapplicable to the facts alleged in the amended complaint, for in all such cases the defendants were obligated to maintain such bulkheads, dams, canals or channels as would be sufficient to protect the plaintiffs' property from any increase in the volume of water in the streams in question, which reasonably could have been anticipated, and in each case so cited by the plaintiff in error the defendant or defendants were actually maintaining the structures which caused the damage complained of by the plaintiff.

We respectfully submit that the amended complaint does not state facts sufficient to constitute a

cause of action against the defendants in error, and, therefore, the judgment of the trial court should be affirmed.

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